Filed 3/29/10 Yaghobyan v. Tran CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

HASMIK YAGHOBYAN, Plaintiff and Appellant, v. TUAN TRAN et al., Defendants and Appellants.	B212365 (Los Angeles County Super. Ct. No. EC 042149)

APPEALS from a judgment and order of the Superior Court of Los Angeles County. Michael S. Mink, Judge. Affirmed.

Tyron J. Sheppard for Plaintiff and Appellant.

Law Offices of Tony Forberg and Tony Forberg for Defendants and Appellants.

In a bench trial the court found in favor of defendants on plaintiff's causes of action for breach of contract and fraud in the sale of a residence but denied defendants' motion for attorney fees. We affirm both rulings.

FACTS AND PROCEEDINGS BELOW

The parties do not dispute the trial court's findings of fact set out below.

In 2005, Plaintiff Hasmik Yaghobyan entered into a contract to purchase a home in Glendale from defendants Tuan Tran and Huong Nguyen for $1,025,000. The purchase agreement provided in relevant part that within seven days of accepting plaintiff's offer the sellers "shall . . . disclose known material facts and defects affecting the property, including known insurance claims within the past five years." (Bold and some capitalization omitted.) The agreement further provided that if, before the close of escrow, the sellers became aware "of adverse conditions materially affecting the Property, or any material inaccuracy in disclosures, information or representations previously provided to Buyer of which Buyer is otherwise unaware, Seller shall promptly provide a subsequent or amended disclosure or notice, in writing, covering those items. . . ." Upon receipt of such a notice the buyer had "the right to cancel this Agreement . . . by giving written notice of cancelation to seller or seller's agent."

Approximately a week after the parties signed the sales agreement the defendants executed a "Real Estate Transfer Disclosure Statement" in which they represented that they were not aware of any "[s]ubstances, materials, or products which may be an environmental hazard such as, but not limited to, . . . mold . . ." or of any flooding. Defendants did not disclose any insurance claims for damages to the property.

A few days before escrow was scheduled to close, plaintiff's insurance broker informed her that approximately a year and a half earlier defendants had made a water damage claim on their homeowner's policy. Plaintiff immediately contacted the listing realtor who contacted defendants and reported back to plaintiff. The realtor told plaintiff defendants had "entirely forgotten about the claim" in which their insurer had paid $8000 for damages to the first floor of the residence resulting from flooding caused by a

defective toilet. Plaintiff was also informed by the realtor that according to defendants "the prior water damage was not a big deal." The realtor sent plaintiff the paperwork from the company that performed the repairs following the flood.

Plaintiff accepted defendants' claim that the water damage was "not a big deal" and proceeded to close escrow without any further inspection or investigation of defendants' insurance claim.

After closing escrow and moving into the residence plaintiff discovered that the downstairs of the house was infested with mold in the areas where the flood had occurred. Plaintiff proceeded to have all of the mold infestation removed, and to have the affected areas rebuilt including the installation of new flooring and cabinets. The cost of remediating and repairing the mold infested areas totaled $124,000.

Plaintiff brought this action against defendants for breach of contract and fraudulent misrepresentation.

Evidence at trial showed that plaintiff had had previous experience with mold in a residence. Prior to purchasing the Glendale residence from defendants plaintiff resided in a condominium apartment when a water leak in an upstairs apartment resulted in water damage and mold infestation in a wall of her apartment. This required some of the drywall in plaintiff's apartment to be removed, the mold remediated, and new drywall installed.

The evidence also showed that plaintiff had been warned on two occasions during the escrow period that she should have the property tested by a mold specialist before closing. One warning came from the company plaintiff retained to conduct a general inspection of the property. The company did not identify mold in the area of the toilet flood. It did, however, report "'there is a black mold type growth on the back wall under the [kitchen] cabinet and there is the smell of mildew under the sink.'" The company also found and reported a leak around the solar panels on the roof and moisture on the shingles. It recommended that "'a qualified mold company needs to further evaluate [the kitchen] area'" and that the roof be "'further evaluated by a licensed solar company.'"

Plaintiff testified that she chose not to read any of the disclosures or information provided to her regarding mold. She also did not hire anyone during the escrow period to inspect for mold or mildew nor did she require defendants to deal with the mold and mildew under the sink. Instead, plaintiff agreed to a $6,000 credit against the purchase price and accepted responsibility to make the recommended repairs.

In summarizing the facts, the court stated: "Plaintiff, despite (a) all of the information previously provided to her as to the danger of mold, (b) the inspection report finding that there was mold under the sink, and water leaking through the roof, (c) the information she received during escrow as to the insurance claim resulting from water damage (and the documentation regarding same) and (d) her prior knowledge of the danger of water infiltration and mold, experienced by her in her condominium, chose to proceed to close escrow, without any further inspection or investigation." (Fn. omitted.)

The court found defendants did not breach their contract with plaintiff by failing to disclose the existence of mold because plaintiff "failed to prove by a preponderance of the evidence that the Defendants were aware of the presence of mold in the house . . . ."

The court found defendants did breach their contract with plaintiff by failing to disclose the insurance claim for water damage but found that breach did not cause damage to plaintiff because she became aware of the water damage claim through her insurance agent during escrow and chose to close the transaction without obtaining a mold inspection or utilizing any of the other remedies available to her such as rescinding or renegotiating the contract.

As to the fraud cause of action, the court found that defendants "intentionally concealed from the Plaintiff the fact that there had been significant water damage to the Property resulting from a malfunctioning commode, approximately one and one-half years prior thereto, and for which an insurance claim had been made . . . , such concealment was made with the intent to defraud Plaintiff, i.e., to prevent her from knowing about such water damage so as to cause her to enter into a purchase agreement for the Property . . . ; and . . . Plaintiff was damaged in that she had to pay a substantial

sum to have the mold resulting from the water damage re-mediated and to have the affected areas re-built." (Fn. omitted.) The court also found, however, that plaintiff did not reasonably rely on defendants' misrepresentations that there had been no flood on the property and no insurance claim within the last five years. The court based this finding on the evidence that during escrow plaintiff's insurance agent informed her of the water damage, provided her with the documentation of the repairs and that the defendants admitted they had filed a claim for this damage with their insurance company. The court found it unreasonable that despite this knowledge and her previous experience with mold in a dwelling plaintiff chose to close escrow rather than investigate whether there were any further mold or water problems in the residence.

After the trial court filed its memorandum of decision, defendants moved for attorney fees under the sales agreement which provided: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller . . . ." This attorney fee provision was modified by another provision in the agreement that stated that if "any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees . . . ." The trial court denied defendants' motion for attorney fees on the ground defendants refused plaintiff's request that they mediate their dispute.

Plaintiff appeals from the judgment for defendants. Defendants appeal from the order denying them attorney fees.

DISCUSSION

I. CAUSE OF ACTION FOR BREACH OF CONTRACT

"Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain. [Citation.]" (*Vu v. California Commerce Club, Inc.* (1997) 58 Cal.App.4th 229, 233.)

Here the trial court found that although defendants breached their contract with plaintiff by not disclosing the insurance claim for water damages such failure was not the cause of plaintiff's damages because she became aware of the insurance claim through her own insurance broker during escrow and, despite this knowledge, she chose not to have the area of the flood inspected for mold, not to rescind the contract based on the breach, and not to attempt to renegotiate the purchase price (except for a $6000 credit). The trial court's findings of fact are amply supported by the evidence and sustain the court's conclusion that the damages suffered by plaintiff were not the result of defendants' breach of contract.

In her brief on appeal plaintiff implies that she learned of defendants' misrepresentations regarding the flood and the insurance claim too late to conduct any follow-up investigation or to attempt to rescind or renegotiate the contract. She maintains she had already sold her present home and the new buyer's tenants were ready to move in. Plaintiff's assertions are not accompanied by any citation to evidence in the record nor does she state that she raised the issue of impossibility in the trial court. Her assertions, therefore, are not cognizable on appeal. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1037 [failure to cite to record]; *Junkin v. Golden West Foreclosure Service, Inc.* (2010) 180 Cal.App.4th 1150, 1158 [failure to raise issue in trial court].)

II. CAUSE OF ACTION FOR FRAUD

The trial court found that defendants intentionally concealed the facts that the property had suffered "significant water damage" for which an insurance claim had been paid and found that such concealment was made with the intent to defraud plaintiff by "prevent[ing] her from knowing about such water damage so as to cause her to enter into a purchase agreement for the Property[.]" The court concluded, however, plaintiff's fraud cause of action failed because during escrow she learned of the flood in the downstairs bathroom, the extent of the damage caused by the flood and that defendants had filed an insurance claim and therefore she could no longer justifiably rely on defendants' representations there had been no flooding and no insurance claims.

We agree that plaintiff failed to prove her cause of action for fraud but for a different reason.

Fraud by concealment is "[t]he suppression of a fact, by one who is bound to disclose it." (Civ. Code § 1710 (3).) Plaintiff could not base her fraud cause of action on defendants' failure to disclose the flooding and the insurance claim at the time the parties executed the sales agreement because under the agreement the defendants' duty to disclose those facts did not arise until seven days *after* executing the agreement.[1] Rather, plaintiff's fraud cause of action had to be based on defendants' affirmative misrepresentations, made after the contract was signed, that there had been no flooding and no insurance claims within the past five years. Assuming the evidence showed defendants made these false representations with the intent to prevent plaintiff from rescinding or renegotiating the contract, the trial court correctly found that plaintiff was not entitled to rely on these representations once she discovered the truth during the course of escrow. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 511 [a party who learns of a fraud before the contract has been completed will not complete it in "reliance" on the fraud].)

Plaintiff cites *Jue v. Smiser* (1994) 23 Cal.App.4th 312, 317, for the proposition that if the buyer justifiably relied on the seller's fraudulent misrepresentations "at the time the initial contract is struck" it is not necessary that the buyer establish continuing reliance on those misrepresentations until the contract is executed in order to maintain an action for damages for fraud. *Jue* is distinguishable because in the case before us the actionable fraud was not a misrepresentation inducing plaintiff to enter into the contract but subsequent misrepresentation designed to induce her to close escrow, an event of independent legal significance. Having learned the falsity of those representations before

---

1 The agreement provided that within seven days of accepting plaintiff's offer the sellers "shall . . . disclose known material facts and defects affecting the property, including known insurance claims within the past five years." (Bold and some capitalization omitted.)

the close of escrow plaintiff could not continue to claim justifiable reliance and create a cause of action by completing the sale.

III. ATTORNEY FEES

Defendants moved for attorney fees under a provision of the sales agreement that provided: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller . . . ." Although defendants were indisputably the prevailing parties in the action the court denied them attorney fees under another provision of the agreement which provided if "any party commences an action without first attempting to resolve the matter through mediation, *or refuses to mediate after a request has been made*, then that party shall not be entitled to recover attorney fees . . . ." (Italics added.) The trial court found that defendants refused to mediate despite plaintiff's request that they do so.

Defendants contend the court erred in denying their motion for attorney fees because only the party initiating the action is required to attempt mediation as a condition precedent to obtaining attorney fees. This argument ignores the plain language of the contract which requires either party to mediate if requested to do so by the other party or forfeit its entitlement to attorney fees. Substantial evidence supports the court's finding defendants refused plaintiff's request to mediate.

Defendants argue the court erred in finding that plaintiff requested mediation. They concede plaintiff submitted a declaration stating that she, through her counsel, requested defendants to mediate and that she personally mailed defendants a copy of the letter requesting mediation and that she produced a purported copy of the letter. They contend, however, that the court should have sustained their objections to plaintiff's declaration and the letter on grounds of hearsay, lack of foundation, and lack of authentication.

Defendants submit no argument in support of their claims of evidentiary error but merely allude to arguments they made in the trial court. It is well settled the practice of

incorporating trial court arguments by reference in an appellate brief does not comply with rule 8.204(a)(1)(B) of the California Rules of Court which "requires an appellate brief 'support each point by argument and, if possible, by citation of authority.'" (*Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285, 290-291, fn. omitted.) We therefore do not consider defendants' claim of evidentiary error.

DISPOSITION

The judgment and the order denying attorney fees are affirmed. Each party to bear its own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.